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10/557,747	11/21/2005	Toru Nishibayashi	Q91609	2298

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EXAMINER	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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In re Application of	:
Nishibayashi et al	:Decision on Petition
Serial No.:10/557,747	:
Filed : 21 November 2005	:
Attorney Docket No.:Q91609	:

This letter is in response to the Petition filed on 30 June 2009 under 37 C.F.R. 1.144 to request reconsideration of the restriction requirement mailed 7 March 2008. The petition was inadvertently mis-indexed in eDAN and only recently brought to the deciding official's attention. The resulting delay in acting upon this petition is regretted.

BACKGROUND AND DISCUSSION

The application, file history and petition have been considered carefully.

In response to the restriction requirement mailed 7 March 2008, applicants elected Group I, claims 1, 2, and 4, drawn to a composition containing olanexidine and polyoxyethylene higher alkyl ethers, with traverse.

The petition filed 30 June 2009 requests rejoinder and the examination of claims 3 and 28, which are described as being drawn to non-elected Group II, a composition containing olanexidine and polyoxyethylene alkylphenyl ethers. However, a review of the current claim set pending at the time of the petition was filed, does not contain a claim 28. The highest numbered claim filed (Claim 27) depends upon elected claim 1 and is directed to the elected subject matter of Group I, a composition containing olanexidine and polyoxyethylene higher alkyl ethers. Claim 27 was examined in the Office action mailed 4 March 2009.

On 16 February 2010, applicants filed an amendment in which all claims directed to the non-elected inventions were cancelled. All remaining claims (independent claim 1 and dependent claims 26-27) require that polyethylene higher alkyl ethers of Group I and do not encompass the polyoxyethylene alkylphenyl ethers of non-elected Group II.

MPEP 818.01 states the elected "becomes fixed when the claims in an application have received an action on their merits by the Office."

MPEP 181.02(C) states that where "applicant is claiming two or more inventions (which may be species or various types of related inventions) and as a result of action on the claims, he or she cancels the claims to one or more such inventions, leaving claims to one invention, and such claims are acted upon by the examiner, the claimed invention this acted upon is elected."

Here, because no claims to the non-elected invention remain pending, the arguments set forth in the petition are not persuasive because they are not commensurate in scope with the current claim set. There are no currently pending non-elected claims which could be rejoined.

DECISION

Accordingly, the petition under 37 CFR 1.144 is **DISMISSED**.

Any request for reconsideration under 37 CFR 1.181 must be filed within TWO (2) MONTHS of the mail date of this petition decision.

The application will be forwarded to the Examiner to consider the papers filed 16 February 2010 and for preparation of an Office action consistent with this decision.

Should there be any questions regarding this decision, please contact Quality Assurance Specialist Julie Burke, by mail addressed to Director, Technology Center 1600, PO BOX 1450, ALEXANDRIA, VA 22313-1450, or by telephone at (571) 272-0512 or by Official Fax at 571-273-8300.


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